

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	MB Docket No. 14-82
)	
PATRICK SULLIVAN)	FRN 0003749041, 0006119796,
(Assignor))	0006149843, 0017196064
)	
and)	Facility ID No. 146162
)	
LAKE BROADCASTING, INC.)	File No. BALFT-20120523ABY
(Assignee))	
)	
Application for Consent to Assignment of)	
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

To: Marlene H. Dortch, Secretary
Attn: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S OPPOSITION TO LAKE'S MOTION TO FOR LEAVE
TO SUBMIT RESULTS OF POST SEPTEMBER 15, 2016 TESTING OF
MICHAEL RICE**

1. On September 26, 2016, Lake Broadcasting, Inc. (Lake) submitted additional documents from its expert, Dr. Duncan-Hively, based on tests she had performed *after* the Enforcement Bureau (Bureau) took her deposition.¹ The Bureau moved to strike Lake's untimely expert submission.² In *Order*, FCC 16M-27, the Presiding Judge recognized that the Bureau was "correct on the ... unfairness of possibly being forced to take a second deposition of Duncan-Hively"³ and concluded that, "in view of the untimeliness and disruption"⁴ of Lake's additional

¹ See Lake Broadcasting, Inc.'s Production of Documents Following September 15, 2016 Deposition, filed Sept. 26, 2016 (Lake's Production).

² See Enforcement Bureau's Motion to Strike or, in the Alternative, Request for a Status Conference, filed Oct. 7, 2016 (Motion to Strike).

³ *Order*, FCC 16M-27 (ALJ, rel. Oct. 25, 2016), at 2.

⁴ *Id.*

expert submission, “*it will be received, if at all, only as rebuttal.*”⁵ The Presiding Judge then instructed Lake to file a motion for leave to submit its new expert submissions, with “(1) legal and practical argument for considering the late [submissions] as rebuttal, and (2) stated reasons for raising rebuttal as a pre-hearing matter.”⁶ On October 28, 2016, Lake instead filed a motion for leave to submit its additional expert submissions as direct evidence (Motion for Leave).⁷ For the reasons described below, Lake’s Motion for Leave should be denied.

2. First, Lake completely ignores the Presiding Judge’s rulings in *Order*, FCC 16M-27, and fails to offer any argument for why the Presiding Judge should consider its untimely expert submissions as rebuttal. Instead, Lake makes it clear that it wishes to submit these documents to enhance the record and to fill an evidentiary gap in its case – *not to rebut anything the Bureau’s expert stated*.⁸ On this basis alone, Lake’s Motion for Leave should be denied.

3. Second, to the extent that Lake now makes it clear that it seeks to introduce these additional expert submissions as direct evidence and not as rebuttal evidence, the Bureau renews the arguments it made in its earlier Motion to Strike with regard to the Abel Assessment of Sexual Interest (Abel Assessment).⁹ Specifically, if the Abel Assessment were allowed into the record, it would result in the need for additional discovery.

4. The Abel Assessment is a multi-part test that involves answering a questionnaire about sexual interests and other personality traits and viewing a series of slides of clothed and partially

⁵ *Id.* (emphasis added).

⁶ *Id.*

⁷ See Lake Broadcasting, Inc.’s Motion for Leave to Submit Results of Post September 15, 2016 Testing of Michael Rice, filed Oct., 28, 2016 (Motion for Leave).

⁸ See Motion for Leave at 2.

⁹ Despite its untimeliness, the Bureau withdraws its objection to the acceptance of Lake’s Static 2002-R test results. As we understand it, the Static 2002-R is a standard test used routinely as a component of a risk assessment. The Bureau does not believe it will require any additional discovery or testimony from Dr. Duncan-Hively regarding this test. Any additional questions the Bureau may have can be covered during cross examination.

clothed people of various ages and sex.¹⁰ At its most basic level, the Assessment measures the amount of time a subject views the various images – the implication is that the longer a subject focuses on a slide, the greater the sexual interest in the slide’s content.¹¹ “The hypothesis behind Dr. Abel’s application of [visual reaction time] is that test subjects will spend more time viewing slides of people in whom they have an interest,” from which one can infer sexual interest and sexual arousal.¹²

5. The Bureau has consulted with its expert, and at a minimum, the Bureau would need the raw data associated with the Abel Assessment conducted in this case, the stimuli used to conduct the Assessment, a detailed description of how the Assessment was administered, and the exact version of the Assessment administered. Only after evaluating how the Assessment was conducted and the arousal patterns it showed, can the Bureau’s expert opine on whether the results have any validity or have any bearing on the issues in this case. The Bureau would also need to further depose Lake’s expert on her administration of the Abel Assessment and the impact of this Assessment on her opinion. These are complicated issues and it would be prejudicial for the Bureau to be required to address them solely on cross examination during the hearing.¹³

6. Moreover, the Bureau has serious questions about the reliability of Lake’s Abel Assessment results. As the Bureau understands it, the Abel Assessment has been used primarily in treatment programs to assess what arouses the subject and to aid in the design of treatment and

¹⁰ See, e.g., *In re Ready*, 824 N.E.2d 474, 476 (Mass. App. Ct. Mar. 24, 2005); *United States v. White Horse*, 177 F. Supp. 2d 973, 974 (D.S.D. Nov. 13, 2001).

¹¹ See *supra* note 10.

¹² *Ready v. Commonwealth*, 2002 WL 1255800, at *1 (Mass. Sup. Ct. May 17, 2002).

¹³ The Bureau renews its objection to incurring the cost of deposing Lake’s expert a second time as a result of Lake’s untimely submission. The Bureau believes any additional deposition of Lake’s expert witness should be at the sole expense of Lake and should occur in Washington, D.C. See *Euquant Integration Services, Inc. v United Rentals (North America), Inc.*, 217 F.R.D. 113 (2003) (denying motion to strike supplemental expert report submitted on the eve of expert deposition but permitting further deposition of the expert at the submitter’s expense).

not as a diagnostic test to determine the risk of recidivism through the absence of arousal. There are concerns that a test subject may be able to falsify and/or manipulate the results by faking “non-arousal” – *i.e.*, distracting themselves during the test to avoid becoming aroused.¹⁴ Indeed, there is nothing in the test itself that would allow one to identify a “faker.” As a result, several courts have concluded that the Abel Assessment is “basically useless” when used as a measurement of pedophilia in the criminal justice context and have deemed the Assessment inadmissible under *Daubert*.¹⁵

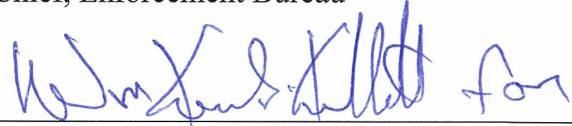
7. For these reasons, the Bureau respectfully requests that the Presiding Judge deny Lake’s Motion for Leave. However, should the Presiding Judge agree to admit Lake’s untimely expert submissions as rebuttal or direct evidence, the Bureau respectfully requests that it be entitled to additional discovery and depositions, at Lake’s expense.

¹⁴ See, e.g., *United States v. Birdsbill*, 243 F. Supp. 2d 1128, 1136 (D. Mont. Jan. 24, 2003).

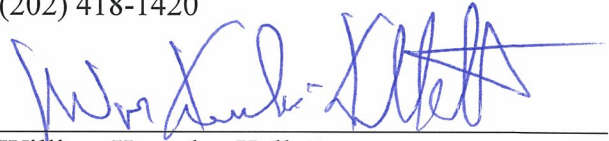
¹⁵ *Id.* See also *Ready*, 2002 WL 1255800, at **13-19 (excluding all evidence of the Abel Assessment as having no bearing on the issue of the petitioner’s present sexual dangerousness), *aff’d*, 824 N.E.2d 474, 476 (Mass. App. Ct. Mar. 24, 2005).

Respectfully submitted,

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November 7, 2016

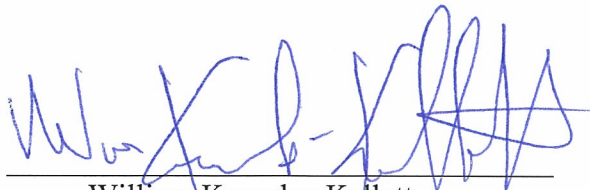
CERTIFICATE OF SERVICE

William Knowles-Kellett, an attorney in the Enforcement Bureau's Investigations & Hearings Division, certifies that he has on this 7th day of November, 2016, sent by first class United States mail and by email copies of the foregoing ENFORCEMENT BUREAU'S OPPOSITION TO LAKE'S MOTION FOR LEAVE TO SUBMIT RESULTS OF POST SEPTEMBER 15, 2016 TESTING OF MICHAEL RICE to:

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And caused a copy of the foregoing to be served via hand-delivery to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554



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